

Nebraska Ethics Advisory Opinion for Lawyers
No. 89-8

UNDER THE FACTS PRESENTED, AN ATTORNEY WHO HOLDS STOCK IN A CORPORATION, IS PRESIDENT OF THAT CORPORATION AND NEGOTIATES AND EXECUTES LEASES WITH THIRD PARTIES IN HIS CORPORATE CAPACITY, IS PRECLUDED FROM REPRESENTING THE CORPORATION IN A SUIT INVOLVING ONE OF THE LEASES WHERE IT IS LIKELY THAT THE ATTORNEY OR A MEMBER OF HIS FIRM WILL BE CALLED AS A WITNESS. OTHER ATTORNEYS IN THE LAWYER'S FIRM ARE ALSO PRECLUDED FROM REPRESENTATION OF THE CLIENT IN THE MATTER. HOWEVER, THE ATTORNEY OR HIS FIRM MAY REPRESENT THE CORPORATION WHERE IT IS LIKELY THAT HE OR A MEMBER OF HIS FIRM MAY BE A WITNESS IN THE TRIAL IF THE TESTIMONY INVOLVES AN UNCONTESTED MATTER, RELATES TO A MERE FORMALITY WHERE NO SUBSTANTIAL EVIDENCE WILL BE OFFERED TO CONTRADICT THE TESTIMONY, OR BECAUSE OF THE DISTINCTIVE VALUE OF HIS SERVICES, HIS DISQUALIFICATION WOULD WORK A SUBSTANTIAL HARDSHIP ON THE CLIENT, PURSUANT TO DR 5-101(B) AND DR 5-102(A).

FACTS

Law firm represents Client, a closely held family farming corporation. Attorney A, a member of the Law Firm, is the president and stockholder of Client. Law Firm has represented Client for over 15 years. Agricultural real estate owned by Client has been leased to various third parties with Attorney A negotiating and executing the lease agreements as president of Client.

There arose, as a result of one of the leases, a dispute between the tenant and Client. The tenant refused to take possession of the premises pursuant to the lease and requests return of the deposit made in accordance with the lease. Client refuses to return the deposit asserting rights to the deposit pursuant to lease agreement. A lawsuit was brought by the tenant against

Client for the return of the deposit and Client has made a counterclaim for damages including lost rent.

As a result of the lawsuit, it appears that Attorney A will be called as a witness to testify as to material matters in this case.

QUESTIONS PRESENTED

Whether Attorney A, and the members of his Law Firm who represent Client, may continue to represent Client in a lawsuit where it appears likely that Attorney A will be called as a witness.

DISCUSSION

DR 5-101(B) states:

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontroverted matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102(A) also provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

EC 5-9 notes the inconsistencies between the roles of an advocate and a witness and states that opposing counsel "may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case." The ethical consideration also declares that a lawyer appearing both as an advocate and a witness is objectionable because "he becomes more easily impeachable for interest and thus may be less effective" and he is, "in the unseemly and ineffective position of arguing his own credibility." The objectivity required of a witness, and the function of an advocate, are therefore inconsistent.

EC 5-10 states in part:

It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as an advocate even though he may be a witness.

The ethical consideration then sets out factors to consider when making the decision such as "the

personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement." Furthermore, after weighing these factors it should be clear that refusal or withdrawal would work an unreasonable hardship on the client and if the question still remains "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."

Under the facts, as presented to the Committee, it is not apparent whether the exceptions contained in DR 5-101(B)(1) and (2) are applicable. Should these exceptions not apply, the Code requires the attorney to withdraw unless his disqualification would work a substantial hardship on his client under DR 5-101(B)(4).

Formal Opinion 339 of the ABA Committee on Ethics and Professional Responsibility ("ABA Committee") specifically addresses whether a lawyer or law firm should withdraw as trial counsel when the testimony of the lawyer or a member of the firm is necessary on behalf of the client.

As a general rule the ABA Committee states:

Ordinarily a lawyer should withdraw from, or decline to accept employment as trial counsel when he, or a lawyer in his firm, ought to be a witness in the cause, unless the testimony will relate only to formal or uncontested matters.

The ABA Committee then elaborated on the substantial hardship provision in 5-101(B)(4) and gave examples of the exceptional circumstances that might require a lawyer to be both an advocate and a witness for his client.

For example, where a complex suit has been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential, it would be manifestly

unfair for the client to be compelled to seek new trial counsel at an additional expense and perhaps to leave to seek a delay of the trial. Similarly, a long or extensive professional relationship with a client may have afforded a lawyer, or a firm, such an extraordinary familiarity with the client's affairs that the value to the client would clearly outweigh the disadvantages of having the lawyer, or a lawyer in the firm, testify to some disputed and significant issues.

The ABA Committee stated further that if the firm or the lawyer decides to remain as counsel, the court and opposing counsel must be advised immediately that the lawyer or a member of his firm intend to testify and the nature of the testimony.

The critical consideration in this circumstance is whether a lawyer or law firm acting as trial counsel has a distinctive and particular value to the client, in the particular case, and whether the distinctive and particular value is so great that substantial personal or financial hardship to the client would result should the lawyer or law firm be required to withdraw.

The ABA Committee concluded that "any doubt about the answer to the ethical question, whether it arises when employment is tendered or after representation has been undertaken, should be resolved in favor of the lawyer's testifying and against his becoming or continuing as counsel."

Under the facts presented to the Committee, Attorney A has not shown that his or his law firm's disqualification as counsel in the pending lawsuit would work either a substantial personal or financial burden on his client. Attorney A who is a stockholder, and as President, negotiated and executed the lease agreement in dispute for the corporation will be put in the position of being both advocate and witness. Because of his personal interest in the lawsuit, he becomes more susceptible to impeachment and may be less effective as a witness. Likewise, he would be in the position of arguing his own credibility before the trier of fact.

Although Attorney A and his law firm have represented Client for over 15 years, there is no indication that the services of the attorney or his law firm in this situation are of a distinctive value, require any specific expertise or long-standing familiarity with the client or the case. Likewise, there is no indication from the facts of this case that the resolution of this dispute would be of a complicated legal nature or that withdrawal of the attorney would result in protracted litigation resulting in a substantial financial burden to the Client.

CONCLUSION

Under the facts presented, an attorney who holds stock in a corporation, is president of that corporation and negotiates and executes leases with third parties in his corporate capacity, is precluded from representing the corporation in a suit involving one of the leases where it is likely that the attorney or a member of his firm will be called as a witness. Other attorneys in the lawyer's firm are also precluded from representation of the Client in the matter. However, the attorney or his firm may represent the corporation where it is likely that he or a member of his firm may be a witness in the trial if the testimony involves an uncontested matter, relates to a mere formality where no substantial evidence will be offered to contradict the testimony, or because of the distinctive value of his services, his disqualification would work a substantial hardship on the client, pursuant to DR 5-101(B) and DR 5-102(A).